UNITED
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AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 766

Case No. 846: INGUILIZIAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 28 July 1994, Ludmilla Inguilizian, a former staff member of the United Nations Office at Vienna (hereinafter referred to as UNOV), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 10 February 1995, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

> "... to restore my entitlement to termination indemnity, which had been authorized by the Assistant Secretary-General, Office of Human Resources Management, in his letter to me of 6 August 1992 (...), which, in the notification of the Secretary-General's decision is stated as having been accorded to me, which, in fact, however - being the lower payment - had been abrogated through the interim arrangements specified in paragraph 4(g) of UNOV Information Circular UN/INF.243 (...)"

Whereas, on 14 April 1995, the Applicant submitted copies of correspondence with the Respondent, dated 30 March and 7 April 1995;

Whereas, on 22 May 1995, the Applicant submitted a copy of a communication from the Respondent, dated 10 May 1995;

Whereas the Respondent filed his answer on 11 December 1995;

Whereas the Applicant filed written observations on 19 January 1996;

Whereas, on 10 July 1996, the Tribunal put questions to the Respondent, to which he provided answers on 12 July 1996;

Whereas, on 17 July 1996, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNOV on 1 August 1968, on a short-term appointment as a Secretary at the G-4 level. On 1 June 1970, the Applicant was promoted to the G-5 level, as an Administrative Clerk. She served on further short-term and fixed-term appointments until 1 April 1971, when she was granted a probationary appointment which became permanent on 1 December 1971. On 1 January 1974, the Applicant was promoted to the G-6 level, and on 1 January 1978, she was promoted to the G-7 level, as an Administrative Assistant. On 1 January 1984, she was promoted to the G-8 level. She separated from service with effect from 28 August 1992, at the G-7 level, the change in grade reflecting a renumbering of levels at the duty station.

On 6 March 1990, the Division of Administrative Services in UNOV issued an information circular to inform staff on the eligibility criteria and mode of payment for the end-of-service allowance (EOSA) established by the International Civil Service Commission. The circular provided, inter alia, in paragraph 4(g), that payment of EOSA would be made to staff members "Upon termination of appointment, including termination for health reasons, after three years or more of continuous service with the United Nations Office at Vienna. In this case, either the termination indemnity or EOSA, whichever is greater, will be paid".

On 30 July 1991, the Office of Human Resources Management (OHRM) forwarded the Applicant's case to the UN Medical Director in order to determine whether the Applicant was eligible for a disability benefit. On 9 December 1991, the Medical Director recommended submission of the Applicant's case to the UN Joint

Staff Pension Committee. On 27 July 1992, OHRM was informed that the UN Joint Staff Pension Committee had awarded a disability benefit to the Applicant.

In a letter dated 6 August 1992, the Assistant Secretary-General, OHRM, informed the Applicant as follows:

> "I regret to inform you that the Secretary-General has decided to terminate your permanent appointment with the United Nations for reasons of health, in accordance with the provisions of Staff Regulation 9.1(a). The effective date of the termination of your appointment will be the date the notice of termination is given.
>
> As you may have already been advised by the Secretary of the United Nations Joint Staff Pension Fund, the payment of your disability benefit will begin on the date following that on which you cease to be entitled to salary and emoluments from the United Nations. Because of your age, no medical review will be required in your case under Administrative Rule H.6.
>
> You will receive termination indemnity in accordance with Annex III to the Staff Regulations. The indemnity will be reduced by the amount of any disability benefit you may receive from the United Nations Joint Staff Pension Fund, for the number of months to which the indemnity rate corresponds. You will also receive three months compensation in lieu of the required notice in accordance with Staff Rule 109.3(c).
>
> ..."

On 21 August 1992, a Personnel Officer, UNOV, informed the Applicant, inter alia, that:

> "... the Secretary-General has decided to terminate your permanent appointment with the Organization for reasons of health, in accordance with the provisions of Staff Regulation 9.1(a). The effective date of the termination of your appointment will be **6 August 1992**, the date of the notice of termination. (emphasis in the original)
>
> You will be entitled to termination indemnity under Annex III, para. (b) of the Staff Regulations which is equivalent to 12 months pensionable remuneration less staff assessment. However, may I point out that any amount of disability benefit you will receive must be deducted from the termination indemnity payable to you. You will also receive

three months compensation in lieu of notice of termination under Staff Rule 109.3(c).

Furthermore, please note that as you qualify for payment of end-of-service allowance [EOSA], only the higher of the two entitlements, i.e. termination indemnity or EOSA, will be paid in accordance with Information Circular 243 dated 6 March 1990 (...).

..."

In a letter dated 1 September 1992, to the Personnel Officer, the Applicant challenged the date of termination - 6 August 1992. She also contested the non-accrual of sick leave and the payment conditions of her termination indemnity and end-of-service allowance, both of which she claimed she was entitled to, on the grounds that they were unrelated.

In a reply dated 2 September 1992, the Personnel Officer informed the Applicant that the effective date of termination had been amended to 28 August 1992, to reflect the date of receipt of notice. He explained the Administration's decision on sick leave. With regard to the payment of her entitlements, he stated, inter alia, as follows:

"End-of-service allowance. As you point out, para. 4(g) of UN/INF.243 provides for payment of the EOSA [end-of-service allowance] in case of termination, including termination for reasons of health, with however the restriction that only the termination indemnity or EOSA, whichever is larger, will be paid. I have taken note of your arguments, most of which had been raised by the staff representatives at the time of the introduction of the EOSA, that both EOSA and termination indemnities should be payable. Those arguments notwithstanding, the provisions of the current policy will have to be applied in your case. As concerns agreed termination, I had simply explained that the circular was silent on this matter since by definition the elements in the separation package for an agreed termination are a matter of negotiation, subject to agreement both on the part of the staff member and the Organization."

On 23 September 1992, the Applicant requested the Secretary-General to review this decision. On 3 January 1993, she lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its

report on 26 April 1994. Its conclusions and recommendations read as follows:

"1) Between 1 January 1972 and 28 February 1987, the Appellant received an allowance as a component of salary to compensate for 'Abfertigung' paid under Austrian law to employees who separate from service and meet certain conditions. By virtue of the regular receipt of this ad hoc benefit over the 15 year period and her continued service after introduction of the replacement scheme until separation on 28 August 1992, the Applicant acquired a right to receive the EOSA benefit.

2) The Applicant was entitled under Regulation 9.3(a) of the Staff Rules to be paid Termination Indemnity in accordance with the rates and conditions specified in Annex III to those Regulations, and was so paid.

3) There is no express or implied condition in the Staff Rules and Staff Regulations preventing the payment of both Termination Indemnity and of any other benefit such as EOSA in the event of termination for reasons of health (indeed, it appears that the 'Abfertigung' compensation allowance as a component of salary and Termination Indemnity were both paid to staff members who separated prior to 28 February 1987). The conditions limiting payment of Termination Indemnity in these circumstances are expressly and exhaustively stated in subparagraph (b) of Annex III of the Staff Rules.

4) The Applicant's acquired right to receive EOSA could not be abrogated, except by adequate legislative authority. Not even the ICSC [International Civil Service Commission] can take such rights away. Insofar as paragraph 4(g) of Information Circular UN/INF.243 of 6 March 1990 purported to abrogate that right, it was without legal effect. UN/INF.243 is merely an information circular on provisional arrangements and not yet the official policy of the Organization. In the opinion of the Panel, appropriate amendment of the Staff Rules and Staff Regulations would be necessary to achieve that effect.

In view of all the above, the Panel recommends that the Appellant be paid the amount of EOSA due to her, and that should it be decided that payment of both Termination Indemnity (in whole or in part) and EOSA should not occur in such cases in future, the Secretary-General introduce appropriate amendments to the Staff Rules. In the interim, the Panel draws attention to the risk that similar claims to that of the Appellant in this case may arise."

On 8 December 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised her as follows:

> "The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's recommendation that you be paid the amount of End-of-Service-Allowance (EOSA) due to you in addition to the termination indemnity. The Board bases its recommendation on the assumption that you had an acquired right to continued payment of EOSA because you had received it on a regular monthly basis prior to the ICSC recommended change to an end-of-service grant. This is an error. The Tribunal has repeatedly held that statutory provisions are subject to prospective change (see Judgement No. 19, Kaplan, (1953), para. 3; see also Judgement No. 370, Molinier (1986), para. XLIII)). It follows that the UN information circular may change, prospectively, the conditions for payment of EOSA. This is what it did. Thus the whole basis of the JAB recommendation is thus wrong in law.
>
> The Board also seemed to assume that EOSA is a Termination Indemnity promulgated by the Staff Regulations and that, therefore, it could not be abrogated by circular. This is mistaken. The EOSA, as a result of ICSC actions, was implemented by Information Circular UN/INF.243, which also defined its terms. It is not a 'termination indemnity' pursuant to the Staff Regulations. It follows that there is no legal obstacle to implementation of the clear intent of Information Circular UN/INF.243, which was to avoid double payments. In your case the Termination Indemnity would be higher that EOSA and so, under para. 5(g) of the circular, no EOSA would be payable.
>
> The Secretary-General has determined that the Board's recommendation is based on errors of fact and wrong in law. The Secretary-General, therefore, cannot accept the recommendations of the Board. No further action in regard to your case will be taken."

On 10 February 1995, the Applicant filed with the Tribunal the application referred to earlier.

On 10 May 1995, the Under-Secretary-General informed the Applicant as follows:

> "The Secretary-General has re-examined his decision of 8 December 1994 on the recommendations made by the JAB in the

above Report in the light of your appeal to the Administrative Tribunal.

The JAB had recommended that you be paid End-of-Service Allowance (EOSA) in addition to Termination Indemnity as it considered that you had an acquired right to payment of EOSA. The Secretary-General concluded that the legislative intent was to avoid double payments and thus concluded that EOSA should not be paid. You appealed to the Tribunal pointing out that EOSA had been paid to you and that you were seeking payment of Termination Indemnity. It is this error that the present review addresses.

The Secretary-General considers that the basic legislative intent is to avoid double payment of EOSA and Termination Indemnity and this was the stated basis of his decision of 8 December 1994 that you should not be paid EOSA. The principle against double payment still applies, even though the JAB had mistaken which payment you were claiming.

We apologize for the confusion but it is clear that the legislative intent in the Administrative Instruction establishing EOSA is to avoid double payment. The Instruction does, however, entitle a separating staff member to the higher of the two amounts. Although payment authorized by a Staff Regulation cannot be taken away by an Administrative Instruction, an Instruction can give a staff member a right to a terminal indemnity payment that is higher than set out in a Staff Regulation, while seeking to avoid double payment of such terminal indemnities. Accordingly, the Secretary-General has decided to treat the payment to you of AS 207,870 for EOSA as made up of AS 199,156 for Termination Indemnity and AS 8,714 as being the difference between EOSA and Termination Indemnity (...). You are thus being paid the higher of the two amounts. However, the Secretary-General maintains that there is no entitlement to double payment, i.e., payment of both EOSA and Termination Indemnity; and it is this issue that he considers is to be decided by the Tribunal.

We note that you have appealed the manner of calculation of EOSA and, if it is decided that the calculations are in error and that EOSA was greater than AS 207,870, you would be paid the difference.

..."

Whereas the Applicant's principal contentions are:

1. The end-of-service allowance and the termination indemnity represent unrelated entitlements, arising from different legal conditions.

2. The Applicant's termination indemnity has been altogether cancelled, pursuant to provisions in UN/INF.243 paragraph 4.(g), but none of the staff rules involves payment restrictions on two unrelated entitlements. The information circular dealing with end-of-service allowance cannot abrogate the Applicant's right to a termination indemnity.

Whereas the Respondent's principal contention is:

The regime of EOSA implemented by the Secretary-General prohibits double payment of EOSA and termination indemnity. That regime is part of the Applicant's terms and conditions of employment and its application to the Applicant does not violate her rights.

The Tribunal, having deliberated from 9 to 26 July 1996, now pronounces the following judgement:

I. The Applicant joined the United Nations Office at Vienna (UNOV) on 1 August 1968, as a Secretary at the G-4 level. She was promoted over the years, and, upon separation, was serving as Administrative Assistant at the G-7 level. The Applicant's services were terminated for health reasons in August 1992. At that time, she was entitled to a termination indemnity under Staff Regulation 9.3 and Annex III of the Staff Regulations. She was also entitled to a local end of service allowance (EOSA). The issue before the Tribunal is whether the Applicant is entitled to payment of both the termination indemnity and the EOSA, in full.

II. There is no dispute as to whether the Applicant is entitled to payment of the termination indemnity, as provided in Staff Regulation 9.3 and Annex III to the Staff Regulations. However, the Information Circular UN/INF.243 of 6 March 1990, informing the UNOV staff of the new regime governing the payment of the EOSA, stated that, upon termination of appointment, "either the termination indemnity or EOSA, whichever is greater, will be paid." The Tribunal finds, as the Respondent concedes, that this text is not properly worded. Clearly the termination indemnity, which is incorporated into the Staff Regulations and Rules, is a right that cannot be limited or reduced by the EOSA. The Respondent's intent, as expressed in the circular, was to reduce the EOSA by the amount of the termination indemnity, in effect, making the EOSA a supplementary payment to be made in the event that it would entitle a staff member to more than he or she would receive otherwise as a termination indemnity. Following the payments made to the Applicant, the Respondent re-characterized these payments, to reflect the payment of a full termination indemnity and a partial EOSA, representing the portion exceeding the termination indemnity.

III. Despite the poorly drafted language of the information circular of 6 March 1990, the Tribunal accepts the clear intent of the Respondent with regard to the circular and finds that the misuse of language, which suggested that the Applicant was denied a termination indemnity, has been rectified. The Applicant is entitled to, and has been paid, a full termination indemnity. The real question before the Tribunal is whether she is also entitled to a payment, in full, of the EOSA.

IV. The EOSA was initially promulgated as a local compensation allowance, which was included as a component of salary from 1 January 1972 to 28 February 1987. The information circular, of 6 March 1990, advised staff members that, with effect from 1 March 1987, the EOSA would be paid to staff members, upon their separation from service. It is clear from the deliberations of the

International Civil Service Commission, which led to the change in the modalities of payment of the EOSA as of March 1987, that consideration was given to the extent to which the termination indemnity, provided for in the Staff Regulations, was financially comparable to the EOSA.

V. In considering the provision of the information circular which permits the reduction of the EOSA by the amount of termination indemnity, the Tribunal looks to the underlying purpose of the EOSA. Both the additional salary component, which was included from 1972 to 1987, and the EOSA payment, which was introduced with effect from 1987, were intended to ensure that conditions of employment for United Nations General Service staff members in Vienna were comparable to prevailing conditions of employment in Vienna. In particular, these measures were devised to approximate to the "Abfertigung" payment which is made to Austrian employees upon their separation from employment.

VI. The Tribunal notes that the purpose of the termination indemnity is to compensate staff members for their accelerated separation from service, as a result of termination. The EOSA, in contrast, is payable, regardless of the manner in which the staff member separates from service, in recognition of this service. For this reason, the Tribunal finds that the payment of EOSA and termination indemnity does not constitute a double payment and the Applicant is entitled to both payments.

Having reached the conclusion that the payment of the EOSA and termination indemnity does not <u>per se</u> constitute a double payment, the Tribunal considers whether the Applicant, who had been entitled to EOSA, could have her entitlement curtailed through an information circular. In this respect, the Tribunal finds that the Applicant's entitlement to this benefit has been acquired through service and cannot be altered by an information circular. The changes contemplated by the information circular of 6 March 1990 could only be implemented prospectively.

VII. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant the portion of the EOSA which she has not received.

All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary